U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

JAN 31 2005

FILE: WAC 03 129 50620 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Nevada that is engaged in the manufacturing and marketing of machinery parts. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in [redacted] Mexico. The petitioner now seeks to employ the beneficiary for three years.

The director denied the petition concluding that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel claims that the beneficiary's position as chief executive officer of both the Mexican and United States corporations satisfies the regulatory definitions of manager and executive. Counsel states that as a start-up company, the petitioning organization employs a manager and a staff, possesses over $250 million in inventory and is presently building a $700,000 facility.

Counsel also references an April 23, 2004 Citizenship and Immigration Services (CIS) memorandum, which, as noted in the memorandum, provides guidance on an adjudicator's authority, during the adjudication of a petition extension, "[to] question another adjudicator's prior approval of the nonimmigrant petition where there is no material change in the underlying facts." Counsel contends that the memorandum dictates that the instant petition should be remanded for review by the director.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The AAO will first address counsel's reference to the 2004 CIS memorandum. The memorandum indicates that in matters relating to an extension of a nonimmigrant petition involving the same facts as the initial petition deference should be given by an adjudicator to the prior approval of the nonimmigrant classification. It is noted in footnote one on page two of the memorandum, however, that the memorandum does not apply to an L-1 new office extension petition. The instant matter involves a request to extend a petition related to a new office. Counsel confirms in both a January 8, 2001 letter submitted with the petition and on appeal that the petitioner is a "start-up company." Accordingly, the 2004 CIS memorandum does not apply.

The issue in the instant matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(i) Manages the organization, or a department, subdivision, function, or component of the organization;

(ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner submitted the nonimmigrant petition on March 14, 2003, noting that the petitioner employed three workers. The petitioner attached a copy of a January 8, 2001 letter submitted with the original petition, which provided the following job description for the beneficiary:

It is intended that [the beneficiary] will be in charge of overseeing the establishment of the [petitioning organization's] office, in North Las Vegas, Nevada, with the position as President of [the petitioning organization]. He will be responsible for every aspect of getting the new enterprise started. He will be the senior level executive in the United States that will put the company in a position to serve existing customer bases in Mexico and seek out and develop new markets in the United States.

As President, [the beneficiary] will use his independent discretion and authority to manage and control every facet of the company. [The beneficiary] will be responsible for staffing, personnel, finance, administration, sales, service, and all other aspects of the operation. Currently, [the beneficiary] is the President of [the foreign organization]. He has been with [the foreign organization] since its establishment in 1981, and has over 20 years experience in this field and has complete responsibility for [the foreign organization]. [The beneficiary's] employment contract with [the petitioning organization] consist[s] of a base salary of $46,040 annually.

The director issued a request for evidence on May 12, 2003, asking that the petitioner provide the following documentary evidence: (1) an organizational chart of the United States business describing its managerial and staffing levels, and clearly identifying the beneficiary's position, all managerial and supervisory employees, and any employees under the beneficiary's supervision; (2) a brief description of the job duties, educational levels and salaries for all employees subordinate to the beneficiary; (3) a detailed description of the beneficiary's job duties in the United States, including which employees the beneficiary directs; (4) the petitioner's Employer's Quarterly Contribution and Wage Report for all employees during the last four quarters; (5) Internal Revenue Service (IRS) Form 941, Quarterly Wage Report, for the last four quarters; and (6) the petitioner's payroll summary and Forms W-2 and W-3.

In response, the petitioner provided the following list of the beneficiary's proposed job duties in the United States:

- Supervise sales achieved every month.
- Review new customers and direct sales manager on forecasting and projection of future sales.
- Look over administration and review publicity plans.
- Follow up on new Aeroquip products coming to market from the main supplier Eaton Corporation.
- Check finances, inventory, banks and employees.
- Supervise construction plans, engineering, materials and expenses for the new office building under construction.

The petitioner also submitted an organizational chart identifying the beneficiary as the owner and president of the company, with the general manager-owner as his direct subordinate. The remaining four employees were identified as: sales manager, office manager, front desk attendant, and external accountant. The petitioner provided the requested Contribution and Wage Reports, one of which indicated that at the time of filing the petition, the petitioner employed three workers: the sales and office managers and the front desk attendant. The petitioner's federal quarterly tax return also identified three employees for the quarter ending on March 31, 2003.

In a decision dated July 31, 2003, the director determined that the petitioner did not establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Following a review of the job duties performed by the three workers employed by the petitioner at the time of filing the petition, the director determined that "[t]here is no evidence on record of a subordinate staff of professional, managerial or supervisory personnel to relieve the beneficiary from performing non-managerial duties." The director also concluded that the petitioner did not establish that its organizational structure supported an executive position, or that the beneficiary supervises a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing non-qualifying duties. Consequently, the director denied the petition.

Counsel filed an appeal on August 27, 2003 claiming that the director's decision was arbitrary and capricious. Counsel stated that the beneficiary, as the chief executive officer of the Mexican and United States entities, "is both an 'executive' and 'manager' by definition." Counsel states that both companies have in excess of sixty employees, including a manager and a staff in the United States entity. Counsel further contends the beneficiary's primary duties are executive, as he is a senior marketer for both organizations. Although counsel indicates that a brief and additional evidence would be submitted, the record contains no additional documentation.

On appeal, counsel requested an oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

The petitioner's brief list of six job duties to be performed by the beneficiary does not adequately demonstrate how the beneficiary would be employed in a primarily qualifying capacity. While required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(C), the petitioner neglected to submit a detailed statement of the job duties previously performed by the beneficiary or a statement differentiating those from the duties to be performed by the beneficiary under the extended petition. For example, the beneficiary would be responsible for following up on "new Aeroquip products coming to market." Although the record indicates that the foreign entity manufactures Aeroquip products, the record does not identify the petitioner's relationship with the supplier of Aeroquip products, Eaton Corporation, or what specific duties are involved in the beneficiary's "follow up" of new products. Additionally, the petitioner does not define how the beneficiary's responsibility of "supervis[ing] construction plans" and the expenses for the petitioner's new office building is related to the beneficiary's employment as a manager or an executive of a marketing and manufacturing firm. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Also, the petitioner's description of the beneficiary's job responsibilities does not substantiate the claim that the petitioning organization, after one year from the date of the approval of the petition, would support the beneficiary in a primarily qualifying capacity. At the time of filing the petition, the petitioner employed the

beneficiary, a sales manager, an office manager and a front desk attendant. The AAO recognizes the managerial titles given to two of the beneficiary's subordinate employees, and further notes that the size of the petitioner's staff is not at issue. Rather, it does not appear that the petitioner employs workers who are responsible for performing the non-qualifying tasks that are presently the beneficiary's responsibility. The petitioner has not accounted for the employment of any employees who would be responsible for the company's marketing and publicity, inventory, or banking. Based on the petitioner's description of the beneficiary's job duties, the beneficiary would be solely responsible for performing these non-managerial and non-executive functions. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO acknowledges the petitioner's organizational chart submitted in response to the director's request for evidence, which identifies an additional two employees. The petitioner, however, must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Consequently, this evidence will not be considered.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner has established the existence of a qualifying relationship between the beneficiary's foreign employer and the petitioning organization as required in the Act at section 101(a)(15)(L). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International,* 19 I&N Dec. at 595.

The petitioner stated in a copy of its January 8, 2001 letter submitted with the original petition and also provided for the present record that the petitioning organization is a wholly owned subsidiary of the beneficiary's foreign employer. The petitioner, however, did not submit any documentary evidence, such as a stock certificate, corporate stock certificate ledger or registry, or the relevant minutes from an annual stockholders meetings, that would confirm the parent-subsidiary relationship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, Schedule E of the petitioner's 2002 federal corporate income tax return identifies "Raquel Pineda De Orozco," the beneficiary's wife, as owning 100% of the petitioning corporation's stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO cannot conclude that the petitioner and the beneficiary's foreign employer possess a requisite qualifying relationship. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.